STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
D'AMBRA CONSTRUCTION	)	
	)	
VS.	)	W.C.C. 01-00374
	)	
FRANKLIN MACHADO	)	

DECISION OF THE APPELLATE DIVISION

SOWA, J. This matter came on to be heard before the Appellate Division upon a petitioner/employee's appeal from the decree of the trial court entered on February 5, 2002. This matter was heard as an Employer's Petition to Review alleging the employee refused to accept an offer of suitable alternative employment and requesting that the court set an earnings capacity.

The trial judge granted the petition at the pretrial conference and the employee claimed a trial. After a full hearing on the merits, the trial judge again concluded that the employee had refused an offer of suitable alternative employment and set an earnings capacity of Five Hundred Four and 00/100 ($504.00) Dollars per week.

The employee filed the following Reasons of Appeal:

> "1. The Decree is against the law and the evidence in that the trial judge erred in finding the employer's offer of suitable alternative employment to be a legally valid offer in light of the fact that the entirety of said offer was not written in the native language of the

employee—only part of the offer was written in English when, in fact, the employee cannot read English.

"2. The Decree is against the law and the evidence in that the trial judge erred by finding the offer of suitable alternative employment to be a legally valid offer in light of the fact that there is no medical evidence that the employee could perform the job offered as it is described in that part of the offer which was written in the native language of the employee."

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id.; Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986). Such review however, is limited to the record made before the trial judge. Vaz, *supra*, citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982).

Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the reasons set forth, we find no merit in the employee's appeal and therefore affirm the trial judge's decision and decree.

As to the employee's first reason of appeal, we believe that the generally accepted "raise or waive" rule is applicable. "No principle of appellate review is better settled in this state than the doctrine that this [C]ourt will not consider an issue raised on appeal that has not been raised in reasonably clear and distinct form before the trial justice." Town of Smithfield v. Fanning, 602 A.2d 939, 942 (R.I. 1992). A trial justice "must rely upon the parties under the adversary process to define carefully the issues presented for determination." Nedder v. Rhode Island

Hosp. Trust Nat. Bank, 459 A.2d 960, 962 (R.I. 1983). The Rhode Island Workers' Compensation Appellate Division has previously held that the "raise or waive" rule is applicable to appeals from trial judges of the Workers' Compensation Court. Iannelli v. Stanley Bostitch, Inc., W.C.C. 94-04710 (App. Div. 9/3/96).

In the instant petition, the employee did not properly raise the issue at trial that the offer of suitable alternative employment was legally invalid because the entire content of the offer was not in the employee's native language. The record does not contain a trial brief in which the employee's counsel directly and specifically challenges the validity of the offer of suitable alternative employment on those grounds, nor does the trial transcript contain specific testimony in which the employee's counsel raises the issue of challenging the validity of the offer of suitable alternative employment for not being in the employee's native language in its entirety. Rather, in the closing moments of trial, the employee's counsel mentions that he is relying on International Packaging v. DaGraca, W.C.C. 91-01576 (App. Div. 7/10/92) in addition to "all other defenses regarding the suitability of the job offer. . . ." (Tr. p. 60)

The record is devoid of any further reference to, explanation of, or comments in connection with, the DaGraca decision. In addition, employee's counsel did not provide the trial court or the Appellate Division with a copy of the decision or the case citation for it. The employee's attorney gave no further explanation, argument, theory, or reasoning in connection with the case other than stating he was relying upon the case. This tribunal is unable to find that the issue contained in the

employee's first reason of appeal was properly raised by the employee's counsel before the trial judge. While making a scant reference to a case while on the record does ensure that the transcript will contain the name of the case, such a procedure does not establish that an issue has been properly raised before the trial judge and preserved for appeal. Thus, we find that the "raise or waive" doctrine applies to the issue raised in the employee's first reason of appeal in the instant petition.

Even if this tribunal were to consider the applicability of the DaGraca decision to this matter, the first reason of appeal would be dismissed, albeit for different reasoning. The facts present in DaGraca are quite distinguishable from the facts in the instant petition. In DaGraca, the offer of suitable alternative employment was sent to an employee entirely in English, when the record established, and the employer had knowledge, that the employee could not read or write English. In the present case, the letter containing the job offer was sent to Mr. Machado in Portuguese, his native language, although the detailed description of the job duties and other documents were in English. The employee's counsel, opposing counsel, and Beacon Mutual Insurance Company, each received a copy of the offer of suitable alternative employment and the attached documents in either English or Portuguese. In addition, the employee signed a document accepting the offer and actually worked in the position for several days.

The holding in DaGraca mandates that, "[I]t is incumbent upon an employer, when invoking the provisions of the suitable alternative employment scheme, to do so in such manner as will convey to the offeree such understandable information

connected therewith so as to enable the offeree to make an intelligent decision as to acceptance or rejection of the offer." DaGraca at p. 7. The letter from D'Ambra Construction notifying the employee of the offer of suitable alternative employment was in his native language of Portuguese. The employee or his counsel would be hard pressed to sustain a claim that there was no effective communication by the employer that an offer of suitable alternative employment had been made. Any contention that the employee did not understand the job offer is belied by the fact that he contacted the employer regarding the job, attended a certification class for the job and actually worked in the position for several days.

Though the course of communication surrounding the offer of suitable alternative employment in the instant petition cannot be classified as a model procedure to be followed by other employers, the company's course of action cannot be found to be fatal to its position. The DaGraca case is of no assistance to the employee under the facts of his case.

In his second reason of appeal, the employee contends that the trial judge erred in finding that the job was suitable alternative employment when there was no medical evidence stating that the employee could perform the job as described in Portuguese in the letter received by Mr. Machado. In reviewing the English translation of that letter, the only reference to the job is that it is a flagger, there is no further description. The letter states that a description of the job is attached, but that description was in English. The employee again attempts to argue that the DaGraca case precludes consideration of any part of the job offer that is not in the

employee's native language. However, as noted above, the employee misinterprets the holding of DaGraca.

The key ruling in DaGraca is that the written offer was invalid because the employee was not able to understand it because it was not in his native language and this affected his ability to reasonably and rationally respond to the offer. There is no evidence that Mr. Machado did not understand the duties of a flagger. He had worked as a laborer for at least three (3) years for the employer prior to his injury. The trial transcript reflects that on a number of occasions he responded to questions from counsel prior to the translation by the interpreter. He signed a document written in English a few days after receiving the letter accepting the job offer. He went to a one-day class to be certified as a flagger and then he worked for four (4) days in the position.

There is no evidence that the employee did not understand the job duties of the position, nor is there any evidence that there was any conflict between the job described in the letter written in Portuguese and the job description used by Dr. Stutz as the basis for his opinion that the employee could do the job. Consequently, that medical opinion is competent evidence upon which the trial judge could rely in making his findings. The employee's second reason of appeal is therefore dismissed.

Based upon the foregoing, we find that the findings of fact made by the trial judge are not clearly erroneous. For the aforesaid reasons, the employee's reasons

of appeal are hereby denied and dismissed, and the trial judge's decision and decree are affirmed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a decree, copy of which is enclosed, shall be entered on

Rotondi and Bertness, JJ. concur.

ENTER:

_____
Rotondi, J.

_____
Bertness, J.

_____
Sowa, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on February 5, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Rotondi, J.

_____
Bertness, J.

_____
Sowa, J.

I hereby certify that copies were mailed to Gary J. Levine, Esq. and Michael T. Wallor, Esq. on

_____